IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

RACHEL P.,
Appellant,

v.

DEPARTMENT OF CHILD SAFETY AND H.P.,
Appellees.

No. 2 CA-JV 2013-0113
Filed July 24, 2014

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Civ. App. P. 28(c); Ariz. R. P. Juv. Ct. 103(G).

Appeal from the Superior Court in Cochise County
No. JD201000051
The Honorable Donna M. Beumler, Judge

AFFIRMED

COUNSEL

Harriette P. Levitt, Tucson
Counsel for Appellant

Thomas C. Horne, Arizona Attorney General
By Laura J. Huff, Assistant Attorney General, Tucson
Counsel for Appellee Department of Child Safety

Mark A. Suagee, Cochise County Public Defender
By Mark A. Suagee, Public Defender, Bisbee
Counsel for Appellee H.P.

MEMORANDUM DECISION

Presiding Judge Miller authored the decision of the Court, in which Chief Judge Eckerstrom and Judge Espinosa concurred.

M I L L E R, Presiding Judge:

¶1 Rachel P. challenges the juvenile court's order appointing a permanent guardian for her son, H.P., born in 2005.[1] For the reasons set forth below, we affirm.

¶2 The party moving for the appointment of a permanent guardian "has the burden of proof by clear and convincing evidence." A.R.S. § 8-872(F). We will not disturb the juvenile court's order establishing a permanent guardianship unless its factual findings are clearly erroneous, *see Jennifer B. v. Ariz. Dep't of Econ. Sec.*, 189 Ariz. 553, 555, 944 P.2d 68, 70 (App. 1997), that is, unless no reasonable fact finder could have found the evidence satisfied the applicable burden of proof, *see Denise R. v. Ariz. Dep't of Econ. Sec.*, 221 Ariz. 92, ¶ 10, 210 P.3d 1263, 1266 (App. 2009). Pursuant to A.R.S. § 8-871(A)(3), the court may establish a permanent guardianship if it is in the child's best interests and if, when the child is in the Department of Child Safety's (DCS)

[1]H.P.'s father is not a party to this appeal.

custody,[2] DCS "has made reasonable efforts to reunite the parent and child and further efforts would be unproductive." A court must "give primary consideration to the physical, mental and emotional needs of the child." A.R.S. § 8-871(C).

¶3 Viewed in the light most favorable to sustaining the juvenile court's ruling, *see Lashonda M. v. Ariz. Dep't of Econ. Sec.*, 210 Ariz. 77, ¶ 13, 107 P.3d 923, 928 (App. 2005), the evidence established that in 2009 and 2010, DCS received reports that Rachel had engaged in domestic violence while H.P. was in the home, had abused methamphetamine and possessed drug paraphernalia accessible to H.P., and had reported seeing ghosts in her home. Because Rachel refused to cooperate with the terms of the voluntary protective action plan or to participate in drug testing, DCS removed H.P. from her custody in October 2010 and filed a dependency petition. After testing positive for drugs in December 2010 and January 2011, Rachel admitted that she had abused substances and had possessed drug paraphernalia and a propane torch accessible to H.P., and the court adjudicated H.P. dependent as to her.

¶4 DCS offered various services to Rachel, including drug testing through hair-follicle and random urine analysis, a psychological evaluation, individual and family counseling, supervised visits, and transportation. In May 2011, H.P. was placed with his maternal uncle, Christian. As of July 2011, Rachel had consistently refused to perform hair follicle drug tests, and as of September 2011, her case was closed "due to lack of contact and non compliance."

¶5 Home studies were conducted and approved as to both Christian and the maternal grandfather, but DCS recommended H.P. remain with Christian and noted that, after speaking with H.P. on "several different occasions," he was "very adamant about not wanting to go live with his grandfather." In September 2011, Rachel

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[2]The Department of Child Safety (DCS) is substituted for the Arizona Department of Economic Security in this decision. *See* 2014 Ariz. Sess. Laws 2nd Spec. Sess., ch. 1, § 20.

participated in a drug test, which was positive for amphetamine and methamphetamine. At the October 2011 permanency planning hearing, the juvenile court changed the case plan goal to permanent guardianship, and at the court's direction, DCS filed a motion for appointment of Christian as H.P.'s permanent guardian.

¶6 Although Rachel requested another drug test in April 2012, she did not complete it, and informed her case manager that she was "not engaging in anything" until another attorney was appointed to represent her. Rachel did not comply with a court order directing her to participate in a psychological evaluation and hair-follicle testing in May 2012, or a court-ordered psychological evaluation in December 2012.[3] The juvenile court held a contested guardianship hearing between December 2012 and September 2013: the court granted DCS's motion for permanent guardianship, appointed Christian as H.P.'s permanent guardian, and denied Rachel's motion for change of placement to the maternal grandfather. This appeal followed.

¶7 In its ruling granting the permanent guardianship, the juvenile court found H.P. had "a significant and ongoing relationship with [Christian] that predates the dependency," and DCS had "made reasonable efforts to reunite the parents . . . and the child, and further efforts would be unproductive and/or reunification of the parents and the child is not in the best interests of the child because the parents are unwilling or unable to properly care for the child." In keeping with this observation, the court found Rachel had failed to consistently engage in services, specifically noting her refusal to "participate in the hair follicle test or

[3] Counsel maintains in her opening brief that Rachel "did, in fact, participate in a psychological evaluation, which established that she did not suffer from mental illness and did not need any treatment." The record citations are either not on point or directly contradict that contention. The transcript of December 19, 2012, at pages ten to thirteen, indicates Rachel was offered two psychological evaluations to determine mental stability, ability to parent, and services needed, but she did not participate.

psychological evaluation," and that she had not maintained contact with DCS or conducted herself appropriately in H.P.'s presence. The court further ordered "that visitation between [H.P.] and his parents shall be at the discretion of [Christian]."

¶8 Rachel first argues the juvenile court's order appointing a permanent guardian is "void for lack of jurisdiction" because the motion for permanent guardianship did not state whether H.P. is subject to the Indian Child Welfare Act of 1978 (ICWA), 25 U.S.C. §§ 1901 through 1963, and the court, therefore, did not find that H.P. was not an Indian child under ICWA. *See* A.R.S. § 8-872(A)(6) (requiring that motion for permanent guardianship indicate whether child is subject to ICWA). There is no requirement, however, that the trial court must find ICWA does not apply before it can establish a permanent guardianship. *See* § 8-871(A).

¶9 Moreover, at the October 2010 preliminary protective hearing in the dependency matter, the court found that ICWA did not apply.[4] In addition, Rachel's December 2010 pretrial statement provided that ICWA was inapplicable, and the October 2010 "Report to the Juvenile Court for Preliminary Protective Hearing and/or Initial Dependency Hearing" provided that Rachel had "stated her son is not Native American." Accordingly, to the extent DCS's motion was technically flawed, we reject Rachel's argument that the defect rendered the court's order void for lack of jurisdiction. Not only does § 8-871(A) lack such a requirement, but the record is clear the court did, in fact, make the finding in this matter.

¶10 Rachel next contends the juvenile court abused its discretion in denying her request to appoint a guardian ad litem (GAL) for H.P., a request she made for the first time seventeen months after DCS filed the guardianship motion and three months after the guardianship hearing began. Noting that it was "awfully late in the game for a new attorney to come in [as a GAL]," the court

[4]This fact was further reflected in DCS's November 2011, May 2012, and August 2012 Disclosure Statements.

nonetheless granted Rachel's request, but subsequently vacated its ruling after learning "it would be extremely difficult to find someone to serve [as GAL], given the number of lawyers that have been appointed in this case." The court also noted that H.P.'s attorney had been "meet[ing] his ethical requirements with respect" to H.P., and that it would not be in H.P.'s best interests to delay the proceedings in order to locate a GAL.

¶11 Rachel argues the juvenile court failed to distinguish between a GAL, who advocates for his or her client's best interests, and an attorney, who advocates for his or her client's wishes, and further asserts the court could have found either a non-attorney or someone from another county to serve as GAL. *See* Ariz. R. P. Juv. Ct. 40(A) (guardian ad litem appointed "to protect the interest of the child"); ER 1.2(a), Ariz. R. Prof'l Conduct, Ariz. R. Sup. Ct. 42 ("lawyer shall abide by a client's decisions concerning objectives of representation"). But we find no abuse of discretion by the trial court, particularly in light of Rachel's request for a GAL well after the already protracted dependency and guardianship proceeding had begun, and the court's familiarity with the case and the conduct of H.P.'s attorneys.[5] *See Kelly R. v. Ariz. Dep't of Econ. Sec.*, 213 Ariz. 17, ¶ 29, 137 P.3d 973, 979 (App. 2006) (court's decision whether to appoint GAL reviewed for abuse of discretion).

¶12 Rachel next argues there was insufficient evidence to support the finding of a permanent guardianship.[6] Although Rachel

[5]The same judge presided over this matter from its inception in 2010.

[6] We reject Rachel's suggestion that the evidence was insufficient because H.P. was not in Christian's custody as a dependent child for at least nine months when the motion for permanent guardianship was first filed in October 2011. *See* A.R.S. § 8-871(A)(2). Not only did the juvenile court grant DCS's request that it waive that requirement for good cause, as the statute permits it to do, but H.P. had been in Christian's custody for more than nine months by the time DCS filed the amended motion for permanent guardianship in August 2012.

maintains DCS failed to make reasonable efforts to reunite her with H.P., as § 8-871(A)(3) requires, she also seems to argue she did not need the services offered, asserting she was not using drugs, had no mental health issues, and no longer had contact with the individual involved in an earlier domestic violence incident. She further maintains she was entitled to increased and unsupervised visits with H.P. despite having complied with only one of the ten referrals for drug testing, and asserts "there was no indication during the vast period of time this case was pending that [she] continued to use drugs."[7] She also contends, without support, that "[t]he [mental health] evaluation established that [she] was not mentally ill and did not need further treatment."

¶13 As previously noted, Rachel resisted the services offered to her, some of which were court-ordered. Not only does the record belie Rachel's argument that DCS failed to make reasonable efforts to reunite her with H.P., a position the juvenile court rejected repeatedly during the dependency proceedings, but it supports DCS's testimony that additional efforts to reunify H.P. with Rachel would have been unproductive. *See Mary Ellen C. v. Ariz. Dep't of Econ. Sec.*, 193 Ariz. 185, ¶ 37, 971 P.2d 1046, 1053 (App. 1999) (in context of proceedings to terminate parental rights, courts have stated DCS "need not provide 'every conceivable service,' [but] it must provide a parent with the time and opportunity to participate in programs designed to improve the parent's ability to care for the child."), *quoting In re Maricopa Juv. Act. No. JS-501904*, 180 Ariz. 348, 353, 884 P.2d 234, 239 (App. 1994).

¶14 In a related argument, Rachel contends that Christian is not a "fit and proper" guardian for H.P. because he has a criminal history that DCS failed to investigate, he provided "vague" and "highly questionable" testimony regarding his history, and, DCS

[7] However, Rachel tested positive for amphetamine and methamphetamine on her September 2011 hair follicle test, and was arrested in October 2012 for possession of drugs and drug paraphernalia.

failed to verify his ability to support H.P. *See* A.R.S. § 8-872(E) (requiring investigation to determine "whether the prospective permanent guardian or guardians are fit and proper persons"). It appears Rachel is asserting that appointing Christian as H.P.'s permanent guardian was not in H.P.'s best interests. *See Jennifer B.*, 189 Ariz. at 557, 944 P.2d at 72 (best interests in potential guardianship established by either showing affirmative benefit to child by removal from custodial relationship or detriment to child by continuing in custodial relationship); *Audra T. v. Ariz. Dep't of Econ. Sec.*, 194 Ariz. 376, ¶ 5, 982 P.2d 1290, 1291 (App. 1998); *see also* § 8-871(C) ("In proceedings for permanent guardianship, the court shall give primary consideration to the physical, mental and emotional needs of the child.").

¶15 Here, the record supports the juvenile court's findings that H.P.'s best interests would be served by establishing a permanent guardianship with Christian, "with whom he has a loving and ongoing relationship," and that H.P.'s "need for permanency, family support and stability would be served by the permanent guardianship." The evidence showed that Christian had been in H.P.'s life "since he was born." A DCS unit supervisor testified that Christian, with whom H.P. had been living for almost two years at the time of the hearing, was a "fit caregiver who has demonstrated the ability to meet all of [H.P.'s] needs while placed with him." DCS case managers, supervisors, and program managers also testified that H.P. was "doing great" in Christian's care, and that "the impact of separation [from Christian] would be significant" and "harmful" to H.P. Additionally, there was testimony that it was in H.P.'s best interests to be placed permanently with Christian, who "can meet all of [H.P.'s] medical, educational, and behavioral needs," has "provided a stable home for him," and was willing to facilitate visits with Rachel.

¶16 Accordingly, in light of the abundant evidence establishing that a permanent guardianship with Christian was in H.P.'s best interests, we cannot say the juvenile court erred by so finding. *See In re Pima Cnty. Juv. Action No. 93511*, 154 Ariz. 543, 546, 744 P.2d 455, 458 (App. 1987) (juvenile court "in the best position to weigh the evidence, judge the credibility of the parties, observe the

parties, and make appropriate factual findings"); *see also Jesus M. v. Ariz. Dep't of Econ. Sec.*, 203 Ariz. 278, ¶ 4, 53 P.3d 203, 205 (App. 2002) (appellate court will not reweigh evidence or substitute judgment for that of juvenile court).

¶17 Rachel also contends the juvenile court abused its discretion by refusing to appoint the maternal grandfather as H.P.'s permanent guardian. She argues, at length, why the grandfather would have been a more suitable placement than Christian, asserting DCS essentially ignored the facts that were revealed in the grandfather's home study and that the court "committed reversible error in failing to consider placement with a more appropriate guardian." However, Rachel failed to appeal from the juvenile court's denial of her April 2013 motion to place H.P. with the grandfather rather than Christian, a ruling that was a final, appealable order. *See Antonio P. v. Ariz. Dep't of Econ. Sec.*, 218 Ariz. 402, ¶ 7, 187 P.3d 1115, 1117 (App. 2008) (order awarding, ratifying, or changing custody of dependent child final appealable order). Rather, her notice of appeal refers only to "the decision . . . granting the State's First Amended Motion for Permanent Guardianship." *See* Ariz. R. Civ. App. P. 8(c) (notice of appeal "shall designate the judgment or part thereof appealed from"). Accordingly, to the extent Rachel challenges the court's denial of her motion to change placement, we do not have jurisdiction to consider it. *See Lee v. Lee*, 133 Ariz. 118, 124, 649 P.2d 997, 1003 (App. 1982) (appellate court only acquires jurisdiction over matters identified in timely notice of appeal).

¶18 In her final argument, Rachel asserts the juvenile court erred by failing to establish a visitation schedule with H.P., and asks that we remand for this purpose. *See* A.R.S. § 8-872(H) (upon establishing permanent guardianship, "court may incorporate into the final order provisions for visitation with the natural parents"). Instead, the court stated "visitation between the child and his parents shall be at the discretion of the child's permanent guardian." Rachel contends that, based on the strained relationship between her and Christian, this provision is inadequate.

¶19 However, the plain language of § 8-872(H) makes it clear that visitation is within the juvenile court's discretion. During the hearing, the court was presented with evidence that Christian was willing to facilitate visitation between Rachel and H.P., and that he does not want Rachel "to lose contact" with H.P. In addition, considering Rachel's failure to participate in required services, including her testimony that "I don't need substance abuse treatment [because] I'm not on drugs," and her refusal to participate in a psychological evaluation, we see no error in the court's order placing visitation in Christian's discretion. Finally, in light of our ruling, we decline to address Rachel's assertion that her failure to request a specific visitation schedule constituted ineffective assistance of counsel.

¶20 We conclude reasonable evidence supported the juvenile court's order establishing a permanent guardianship for H.P., and we affirm that order.